Supreme Court, U. S.
FILED
JUL 9 1976
MICHAEL RODAK, JR., CLERK

In the

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

## No. 75-1799

BOARD OF EDUCATION OF INDEPENDENT SCHOOL DISTRICT NO. 53 OF OKLAHOMA COUNTY, OKLAHOMA, a public body corporate,

*Petitioner,*

VERSUS

BOARD OF EDUCATION OF INDEPENDENT SCHOOL DISTRICT NO. 52 OF OKLAHOMA COUNTY, OKLAHOMA, a public body corporate; LESLIE FISHER, STATE SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF OKLAHOMA; E. H. "HACK" MCDONALD, ASSISTANT STATE SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF OKLAHOMA; J. PHILLIP WHITE, COUNTY SUPERINTENDENT OF SCHOOLS, OKLAHOMA CITY; JAMES R. PARKER and ALLEN AUSTIN, On Behalf of Themselves and All Others Similarly Situated,

*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

## BRIEF OF RESPONDENTS JAMES R. PARKER AND ALLEN AUSTIN IN OPPOSITION

BARNEY W. MILLER
606 Hales Building
Oklahoma City, Oklahoma 73102

*Attorney for Respondents, James R. Parker, Allen M. Austin and Others Similarly Situated*

July, 1976

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0030

In the

Supreme Court of the United States

OCTOBER TERM, 1975

---

No. 75-1799

---

BOARD OF EDUCATION OF INDEPENDENT SCHOOL DISTRICT No. 53 OF OKLAHOMA COUNTY, OKLAHOMA, a public body corporate,

*Petitioner,*

VERSUS

BOARD OF EDUCATION OF INDEPENDENT SCHOOL DISTRICT No. 52 OF OKLAHOMA COUNTY, OKLAHOMA, a public body corporate; LESLIE FISHER, STATE SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF OKLAHOMA; E. H. "HACK" McDONALD, ASSISTANT STATE SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF OKLAHOMA; J. PHILLIP WH[illegible], COUNTY SUPERINTENDENT OF SCHOOLS, OKLAHOMA CITY; JAMES R. PARKER and ALLEN AUSTIN, On Behalf of Th[illegible]selves and All Others Similarly Situated,

*Respondents.*

---

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

---

# BRIEF OF RESPONDENTS JAMES R. PARKER AND ALLEN AUSTIN IN OPPOSITION

---

## ARGUMENT

The Petition of I-53 simply does not state the allegation of any act, or acts, which deprive any person, or person, of any right secured by the Constitution, and the trial

court properly so found. Respondents Austin and Parker performed the acts complained of at all times as individual citizens exercising their own legitimate and constitutional rights to petition under Oklahoma statutes, which I-53 stipulated were valid and constitutional in the pre-trial order. Austin and Parker not only did not have the support, either overt or covert, of any state, county or local unit of government, nor any school board or official, but, in fact, were resisted at every turn by state, county and local officials, who twice took, and lost, appeals to the Oklahoma Supreme Court. *Haller* v. *Austin*, 487 P.2d 1360; *Austin* v. *State Board of Education*, 497 P.2d 218. The acts of Austin and Parker are thus clearly distinguishable from acting "under color of state laws" as defined in *Adickes* v. *Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, which case also involved "compulsion" and "command" to discriminate by the State, factors not present in this case, although relied upon in argument by I-53 nevertheless.

*Brown* v. *Board of Education of Topeka*, 347 U.S. 483, is certainly a correct statement of what is now well established law, but it is in no way relevant to the facts in this case. The doctrine of separate, but equal, facilities was never raised at any time by I-53 in its complaint, its evidence, or in argument to the court as the record will reflect. I-53 attempts to distort the court's findings concerning adequacy of facilities, funding and curriculum into a finding and approval of "separate, but equal," which the entire opinion wholly fails to support. The court's findings appear for two purposes: First, in connection with allegations in I-53's original complaint concerning loss of facilities and funding, and second, to distinguish between the



fact situations in the present case and those in *Wright* v. *Council of City of Emporia*, 407 U.S. 451, 92 S.Ct. 2196, wherein the creation of a new school district out of an old one resulted in a loss of the best buildings, staff and funding. Here, the school district was fully integrated before and after the de-annexation (until later segregated again by I-53) and continued to operate with as good, or better, facilities, staff and funding than before.

I-53 claims the timing of Austin and Parker's petition to de-annex indicate an intent to "dismantle" an integrated school system, that the loss of the affected area resulted in a lowering of educational and socio-economic levels in the remaining area and a consequent change in quality and direction of the curriculum to fit the changing needs of the students.

As to the timing complained of, in the pre-trial order it was admitted that the patrons in the affected area had been trying to annex into adjoining I-52 for 11 years before the successful effort of July, 1971, during which time they were attempting to move from their all-white district I-53 into an always integrated I-52. This is the exact opposite of the facts in *Wright* v. *Council of City of Emporia*, *supra*, wherein the patrons with the help of city and county officials, quickly carved out a new and separate district composed of most of the white students, as well as the best facilities and tax base. That is the type of state encouraged "color of law" interference with integration efforts that are proscribed by case law, although it is worth noting that even *Wright*, *supra*, was decided by only a 5 to 4 majority. The trial court here had no trouble seeing the very material differences between this case and *Wright*, although

I-53 apparently cannot, and principally relies on it in support of its petition.

I-53 further argues that the lowering of the educational and socio-economic levels of its district resulted solely from the de-annexation efforts of Austin and Parker. This is flatly contradicted by the record. The public housing children entered I-53 one year *before* the de-annexation petition was circulated, and two years before any transfer took place. The lowering of the educational and socio-economic levels complained of by I-53 therefore occurred before Austin and Parker were in any way involved. Their efforts two years later may have resulted in a further decline of the levels, but could not have been the primary cause. The trial court saw this obvious flaw in I-53's argument in finding that I-53 had no constitutional guarantee that any particular student levels would be maintained, noting that, just as it had no constitutional right to prevent the public housing children from moving into, and attending its schools (thus reducing the desired levels), it had no constitutional right to prevent students in the affected area from attending schools in the adjoining district for the same reason (App., p. xiv).

I-53's witnesses admit a school district should adapt its curriculum to the needs of its students, claims to have successfully done so in this case, and that students wanting courses not offered can transfer to other schools where they are available. This is not enough, however. I-53 then argues that the educationally and socially disadvantaged have a constitutional right to require the State, through the courts, to furnish them culturally superior companions, in hopes that some of the supposed superiority will rub off



on them. The Constitution has yet to be stretched quite that far. None of the cases cited by appellant say any such thing, as the trial court properly found.

It has been the position of Austin and Parker from the beginning of this case that I-53 filed it in bad faith, as a last-ditch effort to prevent de-annexation after it became obvious the Oklahoma Supreme Court was about to order the transfer. The children involved were transferred four years ago and I-53 has remained, and still remains, a completely viable school district in all respects. No blacks have ever been involved in this case as litigants, school board members, administrators, or even attorneys. The original trial judge considered the case so lacking in merit that he twice summarily dismissed it upon hearing statements of counsel. After transfer to another judge, he tried it thoroughly and found the contentions of I-53 to be without merit, and his decision was affirmed by the Court of Appeals without dissent. After six years of litigation it is time to put this case to rest.

## CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

BARNEY W. MILLER
606 Hales Building
Oklahoma City, Oklahoma 73102

*Attorney for Respondents,*
*James R. Parker, Allen M. Austin*
*and Others Similarly Situated*

July, 1976

**CERTIFICATE OF MAILING**

I hereby certify that the following who are all of the parties required by law to be served in the above case, were this day mailed three copies of the foregoing Petition for Writ of Certiorari, postage prepaid:

Larry Derryberry, Attorney General,
State of Oklahoma
Room 112, State Capitol Building
Oklahoma City, Oklahoma 73105

James F. Howell
P. O. Box 10798
Midwest City, Oklahoma 73110

William L. Funk
Assistant District Attorney
Oklahoma County, Oklahoma
Court House
Oklahoma City, Oklahoma 73102

Leslie L. Conner
Hightower Building
Oklahoma City, Oklahoma 73102

DATED this ..... day of July, 1976.

.....

Barney W. Miller